

01529

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

*J. Vichere  
Proc I*

**FILE:** B-186755

**DATE:** February 13, 1977

**MATTER OF:** Electronic Composition, Inc.

**DIGEST:**

1. Where contracting officer issues determination and finding that public exigency does not permit synopsis of procurement in Commerce Business Daily nor minimum 30 days' bidding time required by Federal Procurement Regulations (FPR), such action is not objectionable as FPR contemplates exceptions where public exigency does not permit compliance.
2. Failure of contracting officer to issue determination and findings (D&F) justifying negotiation based on public exigency is not basis to sustain protest where record supports exigency and failure to prepare D&F is matter of form rather than substance.
3. While FPR § 1-2.407-1(b) states contracting officer shall examine reasons why less than three bids are received in response to IFB and recommend corrective action to increase competition in future, protest against failure of contracting officer to do so is denied, as prior protest filed with GAO resulted in decision that IFB was restrictive and procuring agency took corrective action recommended; therefore, reaching result required by regulation.

On May 28, 1976, the Department of Commerce (Commerce) issued request for proposals (RFP) No. 6-36955 for automatic patent data processing for the Department's Patent and Trademark Office.

The RFP was issued as a result of an April 29, 1976, decision of our Office (International Computaprint Corporation, B-185403, April 29, 1976, 7(-1 CPD 289) which recommended that the prior solicitation (IFB No. 6-36976) for the requirement be canceled. In that decision, we concluded as follows:

"Accordingly, we believe the IFB as drawn was unduly restrictive of competition and did not permit the full and free competition contemplated by the procurement statute, 41 U.S.C. § 253 (1970) and implementing regulations.

Therefore, the IFB should be canceled and a resolicitation issued which accurately expresses the minimum needs of the Government. Data Test Corporation, supra, (1975). However, taking into consideration the urgent need for continuing services of a responsible contractor by the Patent and Trademark Office, our Office would have no objection to the Commerce Department entering into negotiations with ICC and Informatics and any other firm which can timely demonstrate the requisite technical capability."

Based on the above recommendation, Commerce issued a determination and findings (D&F) on May 28, 1976, which stated that due to the expected cost savings available if award was made promptly, the solicitation would not be synopsisized in the Commerce Business Daily (CBD) pursuant to section 1-1.1003-2(4) of the Federal Procurement Regulations (FPR), which states:

"§ 1-1.1003-2 General requirements.

"(a) In accordance with section 9 of the Small Business Act, all proposed defense procurement actions of \$10,000 and above, and all proposed civilian agency procurement actions of \$5,000 and above, will be published promptly in the Department of Commerce Synopsis (see § 1-1.1002-6), except that the following need not be so publicized:

\* \* \* \* \*

"(4) Procurements which are of such unusual and compelling emergency that the Government would be seriously injured if bids or offers were permitted to be made more than 15 calendar days after issuance of the invitation for bids or request for proposals or the date of transmittal of the synopsis, whichever is earlier;"

The cost saving to the Government which necessitated a prompt solicitation and award was computed by Commerce to be \$42,840 per week. This figure was arrived at by taking the then current contract price of the incumbent contractor, International Computaprint Corporation (ICC), of \$99.50 per patent and comparing it with the price of the

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low bidder under the prior canceled solicitation, Informatics, Inc. (Informatics), of \$68.90 per patent and multiplying the difference by a weekly volume of 1,400 patents.

Therefore, Commerce issued the RFP only to ICC and Informatics on May 28, 1976, and did not synopsize the procurement in the CBD. The RFP required offers to be submitted within 15 days, which time period was subsequently extended by 5 additional days by amendment 2 to the RFP. Accordingly, offers were due on June 18, 1976.

Electronic Composition, Inc. (ECI), learned of the existence of the RFP after its issuance and obtained a copy of the RFP on June 16, 1976. On June 17, 1976, ECI requested a 90-day extension to the June 18, 1976, closing date in order to have sufficient time to prepare a proposal. This request was denied by Commerce and on June 18, 1976, proposals were received from ECI, ICC and Informatics and ECI filed a protest with our Office.

Based upon a technical and cost evaluation, ECI was found to be outside the competitive range and only the proposals of ICC and Informatics were considered further. Best and final offers were requested of ICC and Informatics and when submitted on July 29, 1976, ICC was the low offeror. Award was made to ICC on August 12, 1976, notwithstanding the pendency of ECI's protest before our Office pursuant to a determination under FPR § 1-2.407-8(b)(4) that a prompt award was in the Government's best interest.

ECI first contends that not synopsizing the requirement in the CBD and allowing only 20 days for offerors to respond violated various sections of the FPR. Regarding the requirement for publicizing the procurement in the CBD, as stated above, Commerce's May 28, 1976, D&P complied with the requirement of FPR § 1-1.1003-2(a)(4) as one of the exceptions to the requirement and the protest on this ground is denied.

FPR § 1-2.202-1(c) states that the minimum bidding time to be allowed bidders or offerors when procuring a standard commercial service is 15 calendar days and 30 calendar days when procuring other than a standard commercial service. ECI argues that Commerce did not comply with this provision when it allowed only 20 days for the instant requirement, which was other than a standard commercial service. However, FPR § 1-2.202-1(c) also states that the above time standards need not be observed in special circumstances where the urgency for the services does not permit such delays. We believe

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the present procurement falls within the above-stated exception and, therefore, the protest on this basis is also denied.

Secondly, ECI argues that Commerce did not issue a D&F to justify negotiation based on public exigency as required by FPR 101-202(b). Commerce has not furnished our Office a copy of a D&F to justify the use of negotiation; however, the findings necessary to permit the use of the "public exigency" exception were stated in the D&F, dated May 28, 1976, regarding not publicizing the procurement in the CBD. Therefore, we find Commerce complied with the spirit of the regulations, if not the exact form required. Moreover, our Office has held that the failure of a procuring agency to prepare a D&F in a timely manner is a matter of form rather than substance which does not constitute a basis for sustaining a protest. B-175721(1), March 19, 1973, and Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 281.

ECI also argues that Commerce should have been aware of the firm's interest in the procurement as it had bid on the prior solicitation. It appears from the record that ECI purchased BNA Research, Inc., and that BNA had bid on IFB No. 4-36995, issued January 21, 1974, which IFB had been canceled. BNA was sent a copy of IFB No. 6-36976 (the solicitation canceled pursuant to our prior decision) but did not respond with a proposal and did not comply with the following instructions contained in paragraph 6 of standard form 33A:

"6. FAILURE TO SUBMIT OFFER. If no offer is to be submitted, do not return the solicitation unless otherwise specified. A letter or postcard should be sent to the issuing office advising whether future solicitations for the type of supplies or services covered by this solicitation are desired. Failure of the recipient to offer, or to notify the issuing office that future solicitations are desired, may result in removal of the name of such recipient from the mailing list for the type of supplies or services covered by the solicitation."

Commerce states it assumed that BNA failed to respond to the prior solicitation because it was no longer interested in competing for the requirement and it did not know of ECI's acquisition of BNA and interest in the procurement until ECI requested a copy of the RFP a few days before the closing date.

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In these circumstances, we do not believe the Commerce Department had a duty to forward a copy of the RFP to either BNA or ECI when it was issued because BNA had not previously responded or complied with the above provision and Commerce was unaware of ECI's existence or interest in the procurement.

Finally, ECI protests the failure of Commerce to comply with FPR § 1-2.407-1(b) after the prior IFB was issued and only two bidders, ICC and Informatics, responded. FPR § 1-2.407-1(b) reads as follows:

"(b) If less than three bids have been received, the contracting officer shall examine, to the extent deemed appropriate in accordance with agency procedures, the reasons for the small number of bids received. The purpose of this examination is to ascertain whether the small number of responses is attributable to an absence of any of the prerequisites of formal advertising. (For discussion of the prerequisites of formal advertising, see § 1-2.101.) Award shall be made; however, the record of the invitation for bids (see § 1-2.204) shall include a recommendation by the contracting officer for corrective action which should be taken to increase competition in future procurements of the same or similar items."

While the Commerce Department did not follow the above procedure, we believe the same result was achieved by the prior protest being filed with our Office and our subsequent decision that the IFB overstated Commerce's actual minimum needs and was therefore restrictive of competition. Accordingly, by Commerce taking the corrective action we recommended to increase competition, we do not find Commerce's failure to comply with the above-cited regulation to be a basis for sustaining a protest.

Therefore, the protest of ECI is denied.

  
Deputy Comptroller General  
of the United States